

The respondent requests review of whether or not the claimant has sustained his burden of proof that he suffered an accidental injury arising out of and in the course of employment. Respondent argues that because claimant was not able to advise the court of a specific accident date he failed to meet his burden of proof that he suffered a compensable injury.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant had injured his left elbow in November 2002. Thereafter, when he returned to light-duty work and was pulling quarter inch steel plates with his left arm he felt a pull in his left shoulder. Although claimant could not recall the specific date of his accident, nonetheless, he had notified his supervisor that he had felt something pull in his shoulder. The respondent referred claimant for treatment and, ultimately, Dr. Gurley performed surgery on claimant's left shoulder. And respondent paid claimant temporary total disability benefits from August 3, 2004, until March 7, 2005.

The claimant again returned to light-duty work. But while he was still in rehabilitation for his shoulder claimant was placed back in full-duty work because respondent was short of help. Claimant testified that he has not injured his shoulder since his October 20, 2004 surgery. Claimant testified he now has pain in his shoulder all the time which prevents him from sleeping on his left side.

On August 29, 2005, Dr. Lynn D. Ketchum examined claimant and noted that although claimant had shoulder surgery on October 20, 2004, he still had decreased range of motion, some crepitus and discomfort in his left shoulder. At that time Dr. Ketchum recommended additional physical therapy to improve claimant's range of motion. Dr. Ketchum re-examined claimant on May 9, 2006, and noted claimant still had decreased range of motion, crepitus and discomfort that had progressed over the last three or four months. Dr. Ketchum recommended that the claimant seek further evaluation and treatment due to possible rotator cuff tendinopathy and an impingement syndrome of the left shoulder.

On September 22, 2006, the ALJ ordered Dr. Steven Joyce to perform an independent medical examination to determine if the claimant was in need of additional treatment. On November 20, 2006, Dr. Steven T. Joyce performed the evaluation and concluded the claimant had continued symptoms in the shoulder following the arthroscopic surgery which included an acromioplasty and partial distal claviclectomy. The doctor recommended a repeat MRI to determine if there was any additional shoulder pathology and if so, a repeat arthroscopy of the left shoulder. Upon receipt of the MRI findings which revealed a tear of the anterior-superior labrum, Dr. Joyce recommended arthroscopic surgery on the claimant's left shoulder.

The claimant's uncontradicted testimony was that he injured his left shoulder at work and notified his supervisor. The claimant had alleged an August 1, 2004 accident date and the fact that he received temporary total disability compensation beginning August 3, 2004,

corroborates his uncontradicted testimony that he suffered accidental injury approximately on that date and notified his supervisor. He was then provided medical treatment for that shoulder injury. The claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

Respondent next infers that because claimant and his wife had a clothing store as well as a nightclub, perhaps he injured his shoulder there, because Dr. Ketchum's May 9, 2006 report noted a progression of problems as of the last 3 or 4 months.

Claimant testified that he did not suffer any additional shoulder injury. It is significant that Dr. Ketchum's August 2005 examination revealed claimant had decreased range of motion, some crepitus and discomfort in his left shoulder at that time and his later report contained the same findings although claimant indicated the pain had progressed. Moreover, Dr. Joyce's impression was claimant had continued symptoms in his shoulder following arthroscopic surgery. Based upon the record compiled to date, the claimant has met his burden of proof that his current medical condition is the result of his August 1, 2004 accidental injury to his left shoulder.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 27, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2007.

BOARD MEMBER

c: Steven J. Quinn, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

¹ K.S.A. 44-534a.

² K.S.A. 2006 Supp. 44-555c(k).